

**Office of Chief Counsel
Internal Revenue Service
memorandum
CC:PA:B03:LUDaly**

date: August 8, 2008

to: Connie Hemingway, Campus Compliance Services, Small Business/Self Employed and
Cindy Ocmand, Collection Policy, Small Business/Self Employed

from: Pamela Wilson Fuller
Branch Chief
(Procedure & Administration)

subject: Supplement to Memo Entitled Granting requests for extension of time to pay estate tax
under section 6161

Background

You previously asked us for advice regarding granting requests to extend the time for payment of estate tax under Internal Revenue Code section 6161. You specifically asked whether the IRS could deny requests for an extension of time to pay estate tax if the Form 4768 shows no tax liability due. We stated that the IRS could deny these requests because it would be reasonable to deny a request for extension of time to pay when the taxpayer believes in good faith that no estate tax liability is owed. On May 15, 2008, the IRS issued guidance that states in part, "If the reasonable cause statement provided by the estate indicates no tax will be due, the extension request would be denied because there is no payment to extend. It is reasonable to deny a request for extension of time to pay when the taxpayer believes in good faith that no liability is owed." We now clarify/supplement our previous advice.

Issue

Whether the IRS may create a bright line rule denying all requests for an extension of time to pay estate tax if the Form 4768 shows no tax liability due.

Conclusion

No, the IRS may not create a bright-line rule to deny all requests for an extension of time to pay estate tax if the Form 4768 shows no tax liability due. In all cases, the IRS must use its discretion to determine whether an extension request should be granted. Thus, the IRS must evaluate each case and reasonable cause statement on a case-by-case basis.

Applicable Law and Analysis


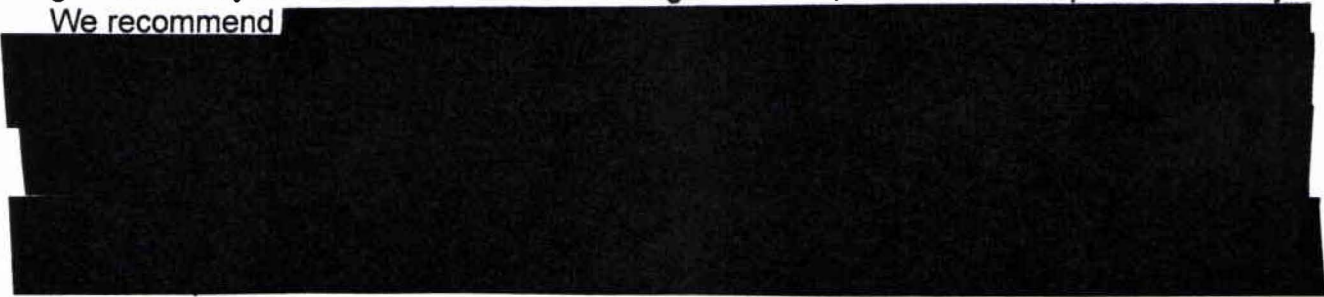
Neither section 6161(a)(1) nor 6161(a)(2) allow for an automatic extension of time to pay. Rather, both sections require the IRS to exercise discretion when reviewing requests to extend the time for payment of the tax. If the IRS creates a bright-line rule that automatically disallows requests for extension in every case, a court would likely

rule that the IRS has abused its discretion and will not uphold the decision. For example, in Estate of Roski v. Commissioner, 128 T.C. 113, 127 (2007), the IRS created a bright line-rule that required all estates electing to pay the estate tax in installments under section 6166 to provide a bond or a lien. The Tax Court determined that the Service's failure to exercise discretion in each case was an abuse of discretion. Id. Because of the similarity between the proposed bright line rule and the bright line rule in Roski, we believe that the proposed rule is not legally permissible.

If the estate provides a good reason on its reasonable cause statement attached to the extension request for showing no tax due, then the IRS should not deny the extension request. One example of a good reason is where the estate tax marital deduction eliminates the tax liability at the time extension is filed, but before the return is due, a probate court rules that the surviving spouse is entitled to a lesser bequest than was made under the will. The court's ruling reduces the estate's marital deduction and results in an estate tax liability. There may be many other instances described in reasonable cause statements attached to requests where it would seem reasonable to request an extension of time to pay, but the extension request shows no tax liability due.

In addition, Treas. Reg. § 20.6161-1(b) requires that the request be filed prior to the due date for payment. Thus, if the IRS initially denies the extension request, the taxpayer may not later apply again and will be subject to failure to pay penalties. Thus, it is important that the IRS evaluate all of the extension requests individually based on the facts and circumstances that exist at the time the request is made. We recommend revising the third bullet point on page 2 of the May 15th interim guidance to say, "Although an estate's request for an extension of time to pay may state that no tax liability will be due with the return, consideration will be given to the reasonable cause explanation in evaluating the request."

The interim guidance also implies there is a bright-line rule that grants extension requests for no longer than 6 months when an estate requests both an extension of time to pay and file because the assets of the estate are unascertainable at the time the return is due. If the estate's reasonable cause statement lists a good reason why the estate would need more than 6 months to pay the tax, then the Service must consider the facts and circumstances of that particular case. Although the intent of the interim guidance may not have been to create a bright-line rule, it could be interpreted that way. We recommend





If you have any questions, please contact Laura Daly at (202) 622-3600.